90-349

Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1990

No. _____

MARVIN RATHERT AND
GARY ZYBAK,

Petitioners,

vs.

VILLAGE OF PEOTONE, WARREN BAKER, RONALD CRAMER, JOHN HALL, JAMES JANDA, THOMAS TUCKER, KENNETH EATINGER, RICHARD ANDERSON, AND GARY N. BOGART,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Respondents can prohibit Petitioners from wearing ear studs off duty without violating their Fourteenth Amendment right to liberty.

2. Whether Respondents can prohibit Petitioners from wearing ear studs off duty without violating their First Amendment right to free association.

3. Whether the Seventh Circuit so far departed from the rules governing summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure as to call for an exercise of this Court's power of supervision.

LIST OF PARTIES

The parties listed in the caption of this case are a complete listing of the parties to this petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioners, Marvin Rathert and Gary Zybak, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on June 1, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is set forth in Appendix A. (Marvin Rathert et. al. v. Village of Peotone et. al., No. 89-1435, June 1, 1990, Wood, J.). The January 3, 1989 decision of the United States District Court for the Northern District of Illinois, Eastern Division, granting respondents' motion for summary judgment is set forth in Appendix B.

JURISDICTION

The Court of Appeals affirmed the judgment of the District Court on June 1, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1) and Rule 10 of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S.C.A. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S.C.A. Const. Amend. XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a civil rights action brought by two police officers of the Village of Peotone who claim they were disciplined without regard to their right to liberty, due process and free association in violation of the first and fourteenth amendments and 42 U.S.C. Section 1983. The District Court ruled in favor of the Respondents and the Seventh Circuit affirmed that decision. This case is before this Court for a review of that Seventh Circuit opinion.

Petitioners initiated this action on February 3, 1987 against the Village of Peotone, Chief of Police, Gary Bogart, and various Village trustees. The Petitioners claimed that they were disciplined without

warning or notice in December 1986 and January 1987 because they wore ear studs on and off duty and because they allegedly became intoxicated while off duty and because they failed to complete certain unspecified assignments. Petitioner Marvin Rathert was demoted from Sergeant to Patrolman with a pay cut. (R. 41 par. 14). In their complaint, Petitioners acknowledged that they wore ear studs as personal jewelry off duty and that they met with friends and relatives in Peotone taverns while off duty. They denied, however, wearing ear studs on duty or becoming publicly intoxicated and not completing assignments. (R. 41 par 16).

Gary Zybak lived in Peotone for over twenty years. Since 1979 he served as a Patrolman for the Village of Peotone Police Department. (R. 48 Ex. G p. 3-4).

Beginning in December, 1986 Zybak wore a silver stud 1/8 inch in diameter in his left ear. (Id. at 8, 21). He was never told not to wear the ear stud and was aware of two female officers who did wear earrings while on duty. (Id. at 14).

In December 1986, Zybak received a registered letter directing him to immediately cease wearing an ear stud on duty or off duty. (Id. at Ex. E). Zybak was never informed that it was reported that he was intoxicated or failed to complete assignments. Nevertheless, the same registered letter directed Zybak not to become intoxicated in a public place or to fail to carry out his assignments in the future. (Id.)

Petitioner Rathert lived in Peotone for almost 30 years. (R. 48 Ex. F. p. 24). Since 1980 almost continuously, Rathert

served as a police officer for the Village of Peotone. (Id. at 4). Prior to December 1986, Rathert was the only sergeant on the force which included six sworn and nine to ten part-time personnel. (Id. at 24). Beginning in December 1986, Rathert wore a small gold post 1/8 inch in diameter in his left ear. (Id. at 13, 15). Rathert wore the ear stud for personal reasons including fashion. (Id. at 13). He was aware of female officers who wore earrings on duty and other male residents of Peotone who wore ear studs. (Id. at 15-16, 33).

In December 1986, Rathert received a registered letter directing him to immediately cease wearing an earring on duty or off duty. (Id. at Ex. P). Rathert was never informed that it was reported he was intoxicated or failed to complete assignments. (Id. at 72). Rathert could

not recall becoming intoxicated off duty or failing to follow instructions. (Id. at 38-39). Nevertheless, the same registered letter directed Rathert not to become intoxicated in a public place or to fail to carry out his duties. (Id. at Ex. D). Police Chief Gary Bogart recommended to the Police Committee President and to the Board of Trustees that Rathert be demoted from sergeant to patrolman. (Id.) The Board voted to accept Bogart's recommendation. (R. 41 par. 17).

According to Respondent Bogart, wearing an earring off duty was not a violation of the dress code, since it did not apply to off duty conduct. (R. 48 Ex. I, at 31). (See also Janda dep. R. 48 Ex. K p. 14 - no clear rule on jewelry); John Hall dep. R 48 Ex. L p. 39 allowed to wear jewelry on duty).

Sandra Lee Andres, Rathert's sister-in-law, lived in Peotone almost her entire life. According to Andres, Peotone is a small town. She heard no reaction to her brother-in-law's earring prior to this lawsuit. (R. 48 Ex L p. 6). After this lawsuit hit the papers, Andres heard a lot of people comment that Bogart had no reason to demote Rathert. She claimed that people in the community referred to Bogart's past when he was having troubles and opined that what Rathert did off duty was his business. (Id. at 8). No one told her about Rathert wearing the ear stud. She also explained that the people of Peotone disapprove of everything. As examples she cited the marriage of one of her girlfriends to a black and a guy riding a motorcycle or the priest coming to a fish fry and having a beer. (Id. at 10-11). She also testified

that in Peotone a person can have two drinks and people will think they are drunk. (Id. at 16).

Since receiving their discipline, neither Petitioner has worn his ear stud off or on duty. Further, both Petitioners refrained from attending taverns for fear of being falsely accused again of public intoxication. (R. 48 Ex. G p. 28, 31, 32, R. 48 Ex. F p. 29, 43).

Petitioners two-count complaint alleged deprivation of their due process rights and freedom of association rights. After Respondents filed a motion to dismiss, the District Court dismissed the Petitioners' property interest claim but sustained the liberty interest and free association claims. (R. 35). On cross-motions for summary judgment, the District Court entered judgment in favor of Respondents.

(R. 66, See also App. B). On appeal, the Seventh Circuit affirmed the District Court's decision. (App. A).

REASONS FOR GRANTING THE WRIT

1. The Seventh Circuit Court of Appeals decided the Petitioners' liberty interest in this case under the "rational relationship" test as stated by this Court in Kelley v. Johnson, 425 U.S. 238 (1976). The Seventh Circuit's application of the rational relationship test in this case was directly in conflict with this Court's decision in Kelley.

In Kelley, this Court found that the hair - length regulation of the Suffolk County Police Department was rationally related to the county's method of organizing its police force, and the promotion of safety of persons and property. Id. 425 U.S. at 247. In

defining the constitutional issue to be decided by the lower courts, this Court found,

> The constitutional issue...is whether [the police department's] determination that such regulations should be enacted is so irrational that it may be branded "arbitrary", and therefore a deprivation of [the police officer's] "liberty" interest in freedom to choose his own hairstyle. Id. 425 U.S. at 248.

The police department in Kelley had a specific regulation dealing with hair length. Id. 425 U.S. at 239, n.1, 242 n.4. These regulations also related to the police officer's on duty appearance. Id.

In the instant case, the Peotone Police Department had no specific regulation related to a male police officer's wearing of an ear stud either on duty or off duty. Rathert v. Peotone, No. 89-1435 slip. op. (7th Cir. June 1, 1990) at p. 8; (App. A

p.8) The Seventh Circuit limited its decision to the police officers' off duty wearing of their ear studs and the appropriateness of the reprimand letters and demotion related to that off duty conduct. [1] Id. at p. 8,10.

The Petitioners maintain that the Seventh Circuit's decision upholding the off duty
regulation of their wearing of ear studs did not satisfy the rational relationship test because the Peotone Police Manual lacked a specific regulation concerning the wearing of an ear stud off duty and because the Kelley decision cannot be properly applied to a transitory article

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[1] The Seventh Circuit found that no issue existed regarding the issues of pretext (eg. off duty intoxication, dereliction of duty) and on duty wearing of an ear stud. (App. A pp. 3, 8).

of personal dress that can be worn off duty and be left at home while on duty.

A. The Peotone Police Manual Lacked Any Regulation Governing The Off Duty Wearing of An Ear Stud

The Seventh Circuit found the applicable test in this case to be whether the police policy expressed in the Petitioners' reprimand letters bears a rational relationship to a legitimate public interest. (App. A at p. 8). The Seventh Circuit then analyzed this case under this Court's rational relationship test. Kelley, supra. Under the auspices of the Kelley test, the Seventh Circuit upheld Peotone's discipline of the Petitioners for purely off duty conduct. (App. A at p. 11).

The Kelley test was improperly applied in this case because of the lack of a regulation relating to the Petitioners'

off duty wearing of an ear stud. Without a regulation to challenge, it is virtually impossible for the Petitioners to demonstrate the rational connection between a regulation and a legitimate interest by the Peotone Police Department.

B. The Peotone Police Department's Reprimand for Petitioners' Off Duty Wearing of An Ear Stud Violated the Petitioners' Liberty Interest In Matters of Personal Appearance

In Kelley, the majority of this Court assumed the existence of "some sort of 'liberty' interest within the Fourteenth Amendment in matters of personal appearance." Kelley, 425 U.S. at 244. Justice Marshall, in the dissent in Kelley, went one step further and specifically found that the Fourteenth Amendment does "protect against comprehensive regulation of what citizens may or may not wear." Id. 425 U.S. at 250

(Marshall, J. dissenting). The dissent found support for its position in the 1789 congressional debates over which guarantees should be explicitly articulated in the Bill of Rights. Id. 425 U.S. at 251-252. (Marshall J. dissenting). The liberty interest in this case implicates the personal choice of the Petitioner police officers in their off duty personal appearance and not any issue related to the chosen mode of organization for the Peotone Police Department, the promotion of safety of persons and property or the esprit de corps of the Peotone Police Department.

This Court recognized the dichotomy between the rights of a uniformed police officer versus the citizenry at large. Kelley, 425 U.S. at 244-245. Justice Powell, in his concurring opinion

articulated the balancing test between a uniformed police officer's rights and a citizen's rights. The concurring opinion found that

> When the state has an interest in regulating one's personal appearance. . . there must be a weighing of the degree of infringement of the individuals liberty interest against the need for regulation. This process of analysis justifies the application of a reasonable regulation to a uniformed police force that would be an impermissible intrusion upon liberty in a different context. (emphasis added). Id. 425 U.S. at 249 (Powell, J. concurring).

The Petitioners submit that the regulation of their off duty wearing of ear studs through the official reprimands is not a reasonable regulation, is arbitrary and is an impermissible intrusion on their liberty interests.

The "regulation" through the official reprimands was not reasonable because the

degree of infringement on the Petitioners' liberty interest was extreme in relation to any rational basis attributed to the Peotone Police Department. The Seventh Circuit attempted to justify Peotone's actions by finding that other regulations impacted on the Petitioner's off duty conduct and, by finding that the Petitioner's off duty wearing of ear studs had an adverse impact on police effectiveness due to the community's negative reaction to the Petitioner's off duty wearing of ear studs. Both of these justifications are constitutionally infirm.

First, the main factor which distinguishes this case from Kelley and from the regulations which impact on off duty conduct is the transitory nature of ear studs as a piece of apparel. The hair

length regulation in Kelley obviously affected the police officer's on duty and off duty appearance. Hair, by its very nature, cannot be left at home when the police officer goes to work. It is a permanent facet of a person's personal appearance. Likewise, beards and mustaches are also permanent in nature. (App. A at p. 10). The Seventh Circuit also referred to intoxication as an appropriate off duty restriction. Off duty intoxication is something that can be brought with the police officer when he comes on duty.

The wearing of an ear stud is not like hair length, beard length or intoxication because it can be left at home when the police officer goes on duty or can be easily removed if the officer is unexpectedly called to duty. Therefore,

the justifications upon which the Seventh Circuit relied were not reasonable and were arbitrary in relation to the liberty interest in personal appearance asserted by the Petitioners.

The Seventh Circuit's other justification for upholding the petitioner's reprimands and demotion was that the "wearing of ear studs by Peotone police officers was seen by those who run the police structure as well as by the public generally, to have an adverse impact on police effectiveness." App. A at p. 11. The Seventh Circuit supported this rationale by referring to a small community standard where there "is little difference in the way the police officers are publicly viewed, whether their objectionable conduct as police officers occurs on duty. or off, or whether they

wear the ear stud on duty or off." Id. (emphasis added). Such a rationale justifying the reprimands is constitutionally defective since, by definition, community standards are by their very nature arbitrary and thereby, fail the substantive due process rational relationship test. Kelley 425 U.S. at 248.

By relying on a small community standard, the Seventh Circuit Court adopts a test that is impossible to implement. Under the Seventh Circuit's viewpoint, if Peotone's Police structure and/or citizens were against plaid Bermuda shorts, black "concert" T-Shirts, Air Jordan gym shoes, bright pink or green baseball caps etc., then a police officer's wearing of any of these "objectionable" items of personal apparel would subject him or her to a

reprimand. The ear studs in this case as a piece of ornamental jewelry are in principal, no different than the items noted above. They are all transitory items of personal dress that can be removed at any time. To allow the Peotone community to set the standard for the off duty dress of its police officers allows for small communities to foster a "Salem Witch Hunt" mentality[2].

The arbitrary acceptance of the Peotone community standards as justifying the reprimands of the Petitioners' off duty wearing of ear studs denied the Petitioners their Fourteenth Amendment liberty interest to dress as they pleased. "In an increasingly crowded society in

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[2] If everyone says she is a witch then she must be a witch.. If everyone says that men should not wear ear studs, then men must not.

which it is already extremely difficult to maintain one's identity and personal integrity, it would be distressing, to say the least, if the government could regulate our personal appearance unconfined by any constitutional strictures whatsoever." Kelley, 425 U.S. at 253 (Marshall, J. dissenting). For all of the foregoing reasons, the Petitioners request that this Court grant their Petition.

2. The Seventh Circuit's decision finding that the Petitioner's associational rights were not violated by their reprimand is in conflict with the Ninth and Eleventh Circuits' view of a police officer's off duty associational rights and also is in conflict with the decisions of this Court.

This Court stressed in NAACP v.

Alabama, 357 U.S. 449, 460 (1958), that the freedom to engage in association for the advancement of beliefs and ideas is a basic part of the Fourteenth Amendment due process guarantee of liberty. In NAACP, supra, the Court inferred the right to free association from the First Amendment protection of speech and assembly.

Several Courts of Appeals have found a violation of a policeman's freedom to associate when that officer's employers have disciplined the officers for off-duty related activities. Thorne v. City of El Segundo, 726 F.2d 459, 471 (9th Cir. 1983) cert den. 469 U.S. 979 (1983) (held that questioning of female police applicant about her off-duty sexual behavior violated her right to freely associate); and Wilson v. Taylor, 733 F.2d 1539, 1543-1544 (11th Cir. 1984) (police officer

dating a convicted felon's daughter; held: discharge of officer violated his right to freely associate and that dating was constitutionally protected conduct).

The rationale for the holdings in the above cases is deeply rooted in the philosophical interpretation of the Constitution. This Court found that,

> For at least a quarter century, this Court has made clear that even though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons...It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests...This would allow the government to produce a result which [it] could not command directly . . . . Such interference with constitutional rights is impermissible. Perry v. Sindermann, 408 U.S. 592, 597 (1972).

Perry and especially Wilson v. Taylor, supra, highlight the reasons for the placing of constitutional safeguards upon

the Respondents' conduct in this case. The Petitioners in the instant case wanted merely to wear a simple, non-offensive article of ornamental jewelry during their own private leisure time. In doing so, Petitioners were expressing their desire to associate with others who condone the wearing of an earring as part of their leisure dress. The constitution is intended to allow people like the Petitioners to feel unrestrained freedom to lawfully associate with others without feeling inhibited or without feeling that they will somehow be penalized. The Petitioners were very active in the Peotone community before their reprimands and demotion. The Respondents' actions resulted in a chilling effect on Petitioners' freedom of association. Petitioners were inhibited from freely

associating with their friends and family due to a fear of further reprimand. Respondents' conduct, in demoting Rathert and reprimanding Zybak, caused Petitioners to be held up to public ridicule, to be ostracized from community activities and events and to be socially shunned by their peers.

The types of associations affected by the Respondents' arbitrary actions mainly impacted on the Petitioners' relationships with their family and friends. In Roberts v. United States Jaycees, 468 U.S. 607 (1984) this Court distinguished between two types of constitutionally recognized associational subclasses - certain intimate human relationships and indispensable means of preserving other individual liberties. Id. 468 U.S. at 617-618. The plaintiffs in the instant

case fall under the first classification of intimate human relationships. In defining which relationships were constitutionally protected under the right of free association, this Court stated that,

> [T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty . . . [Family relationships] are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. Id. 468 U.S. at 619-620.

The Respondents' letters of reprimand had a chilling affect on Petitioners' right to freely associate with their family members, friends and peers. Such

an infringement on these intimate relationships is constitutionally infirm.

The Seventh Circuit and the district court took the position that Petitioners could not establish a deprivation of their right to associate because they did not suggest that they wore ear studs in order to express a particular social, economic, educational , religious, or cultural viewpoint. Citing Roberts v. United States Jaycees, 468 U.S. 607 (1984). Petitioners submit that this reading of Roberts is too narrow. As this Court stressed in NAACP v. Alabama, 375 U.S. 449, 460 (1958): "it is immaterial whether the beliefs sought to be advanced by the association pertain to political, economic, religious or cultural matters."

Wilson v. Taylor, 733 F.2d 1539 (11th Cir. 1984) advances Petitioners' view that

the First Amendment freedom of association also applies to purely social or personal associations such as those involved in this case.

For all of the foregoing reasons, the Petitioners would respectfully request that this Court grant this Writ.

3. The Seventh Circuit's decision in this case ignored the basic tenets of Rule 56(c) of the Federal Rules of Civil Procedure and its action has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In order to prevail on a motion for summary judgment, the moving party has the burden to demonstrate the absence of a genuine issue of material fact and the judgment should be granted in the moving

party's favor as a matter of law. Richardson v. Penfold, 839 F.2d 392, 394 (7th Cir. 1988). In determining whether there is a genuine issue of material fact, the court must construe the facts alleged in the light most favorable to the party opposing the motion for summary judgment. Id. Robbins v. Lynch, 836 F.2d 330, 333 (7th Cir. 1988).

A genuine issue for trial exists if there is sufficient evidence, drawing all reasonable inferences in favor of the non-movant, to allow a rational jury to return a verdict for that party. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Summary judgment should be reversed if a review of the entire record, after drawing all inferences from the facts in the light most favorable to the non-movant, reveals that inferences contrary

to those drawn by the trial court might be permissible. Jakubiec v. Cities Service Corp., 844 F.2d 470, 471 (7th Cir. 1988).

In this case, Senior Circuit Judge Fairchild, in his concurring opinion, alluded to two issues where he believed factual disputes existed. (App. A at p. 15 n.1, 16) (Fairchild, J. concurring). Since at least one judge found the existence of disputed factual issues, the Seventh Circuit's decision upholding the District Court's summary judgment finding was in error. Therefore, on procedural grounds under Rule 56(c) of the Federal Rules of Civil Procedure, this Court should now grant the Petitioner's Writ of Certiorari or in the alternative summarily reverse the judgment of the Seventh Circuit and remand this case for a trial on the merits. (See City of Los Angeles

v. Heller, 475 U.S. 796, 798 (1986)).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated August 27, 1990

Respectfully submitted,

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APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 89-1435

MARVIN RATHERT and GARY ZYBAK,

Plaintiffs-Appellants,

v.

VILLAGE OF PEOTONE, WARREN BAKER, RONALD CRAMER, JOHN HALL, JAMES JANDA, THOMAS TUCKER, KENNETH EATINGER, RICHARD ANDERSON, and GARY N. BOGART,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 0957—**James F. Holderman**, *Judge.*

ARGUED NOVEMBER 29, 1989—DECIDED JUNE 1, 1990

Before BAUER, *Chief Judge*, WOOD, JR., *Circuit Judge*, and FAIRCHILD, *Senior Circuit Judge.*

WOOD, JR., *Circuit Judge.* Male police officers wearing earrings?[1] Yes, and that gives rise to the constitutional

[1] What plaintiffs wore was either a gold or silver ear stud about an eighth of an inch in diameter. Since an earring is defined in both the Oxford and Webster Dictionaries as an ornament worn on the earlobe, it appears that an ear stud is a minimum size earring. We will, however, hereafter refer to the particular earrings as ear studs as did the district judge.

issues in this case. Marvin Rathert and Gary Zybak, police officers of the Village of Peotone, Illinois, brought this civil rights action under 42 U.S.C. § 1983 against the Village and various of its officials.[2] Count I of their complaint alleges that they were disciplined without regard to their rights to liberty and due process under the fourteenth amendment and Count II alleges that plaintiffs' free association rights had been violated in disregard of their first amendment rights.[3] In addition to the ear stud controversy, plaintiffs complain they were reprimanded by letters and disciplined for allegedly frequenting taverns while off duty and becoming intoxicated and for failing to complete certain police assignments. As a result of these activities, both plaintiffs suffered letters of reprimand being placed in their police personnel files and Rathert was demoted from sergeant to patrolman with diminished pay.

Upon cross-motions for summary judgment, the defendants' motion for summary judgment was allowed as to all defendants. As to Count I, the substantive due process count, the district court stated in its January 30, 1989, Memorandum Opinion and Order that the dispositive issue was whether the reprimand letters bore a rational relationship to a legitimate public interest. Plaintiffs argued that the allegations in the reprimand letters of public intoxication, failure to complete assigned duties and being disruptive were merely a pretext to discipline plaintiffs for their wearing ear studs. The district court held that the pretext issue was not material to the motion for summary judgment on the ground that even if defendants' sole reason for disciplining plaintiffs was that plaintiffs

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[2] Defendants, in addition to the Village, include the Village Chief of Police, George Bogart; members of the Police Committee of the Board of Trustees of the Village, Ronald Cramer, John Hall and James Janda; and members of the Village Board of Trustees, Thomas Tucker, Kenneth Eatinger, and Richard Anderson.

[3] The district court had previously dismissed much of Count I of this two-count complaint that alleged deprivation of property rights. That dismissal has not been appealed.

wore ear studs, the reprimand was rationally related to a legitimate public interest.

Count II of the complaint alleged that defendants violated plaintiffs' first amendment right of association. Plaintiffs contended that by wearing an ear stud they "were expressing their desire to associate with others who condone the wearing of an ear stud as part of their leisure dress" and that the defendants' discipline in some way "chilled" that desire. The district judge found no associational interest in those circumstances to warrant constitutional protection and granted summary judgment for all defendants also on Count II.[4]

I. FACTUAL BACKGROUND

Plaintiffs, in a general and conclusory manner, branded allegations of public intoxication and dereliction of duty as merely pretextual reasons for their reprimands. Rathert claimed that he was never informed of reports that he was intoxicated while off duty or that he failed to complete assignments. Zybak claimed that Chief Bogart never wrote down the reports of his intoxication while off duty, his failure to appear on the range for firearms training, or his involvement in an automobile accident. Rathert was merely unable to recall being intoxicated and failing to complete assignments and Zybak did not deny the truth of the reports of his intoxication and problems in carrying out his duties. In allowing the defendants' motion for summary judgment, however, the district court did not resolve the pretext issues and we likewise find there is no need to pursue it. Plaintiffs do not argue that any failure of notice or hearing in connection with their reprimands raises a constitutional or factual issue. We therefore view this case as appropriate for summary judgment.

[4] The district court, by disposing of the complaint on its merits by summary judgment, did not reach the issue of the qualified immunity of the defendants.

The general factual background is neither disputed nor complicated. Both plaintiffs reside in the Village of Peotone, Illinois, and are officers serving on the village police department. Peotone is a village in a rural area south of the Chicago metropolitan area and has a population of less than 5,000 with a correspondingly small police force. At the time the events giving rise to this action occurred, the force had only two supervisory officers, defendant Chief of Police Bogart, and Rathert, who was then a sergeant. Rathert has been on the village police force since 1980 except for a short period when he worked for the Will County Sheriff's Police. Zybak became a part-time village police officer in 1979 and a full-time patrol officer and investigator in 1982. Chief Bogart conceded that both officers had performed their duties effectively up until late 1986 when the present troubles surfaced. Thereafter Chief Bogart claims the plaintiffs' performance as police officers deteriorated.

In December of 1986 things happened which have evoked the most attention. That month Rathert went to a jewelry store in Matteson, Illinois, The Jewel Box, had his left ear pierced, and purchased his gold ear stud. Prior to that time Rathert had not worn any type of earring. He explained that he started wearing the ear stud for personal reasons, because he "wanted it," and because he liked ear studs for fashion. As between his right or left ear there was no particular reason to have his left ear pierced except he wanted the ear stud there. Zybak, following Rathert's lead, went to the same jewelry store a short time later, had his left ear pierced, and bought himself an ear stud like Rathert's, but silver. Zybak explained that he wore his ear stud for "personal reasons," for personal jewelry adornment, and for fashion.

Both plaintiffs claimed there was no intent to wear their ear studs while on duty, but that it was necessary to do so for the first six weeks to prevent the newly pierced holes from closing. Each wore a Band-Aid over the ear stud while on duty so as to try to hide the ear stud.

Zybak had some trouble with his Band-Aid ear stud concealment. On a cold day without his knowledge, the Band-Aid dropped off while he was on duty. Zybak explained this had happened even though he periodically checked to make sure the Band-Aid was still in place. While off duty, neither officer wore a Band-Aid and the ear studs were easily visible.

It did not take Chief Bogart and the other defendants long to react to these ear stud developments. Chief Bogart drafted a reprimand letter for each plaintiff that was approved in early January 1987 by the other defendants in their official capacities. Each plaintiff then received the reprimand letter, which asserted that the wearing of an ear stud violated the Peotone Police Policy Manual, that each plaintiff had been seen intoxicated in public, and that each had failed to complete certain police assignments, all in violation of their police regulations. A copy of each plaintiff's own reprimand letter was placed in his individual personnel file. In addition to his reprimand letter, Rathert was demoted from the police force's only sergeant, and the only supervisor in addition to Chief Bogart, to patrol officer. A resulting decrease in salary accompanied his demotion. Upon receiving these reprimands, plaintiffs immediately ceased to wear their ear studs on or off duty, or to frequent taverns or elsewhere where liquor was dispensed.

Although the reprimand letters went into their personnel files, not into the newspaper at least not through any action of the defendants, plaintiffs complained about the resulting effects of the reprimand letters. They claimed that they were held up to public ridicule, were ostracized from community activities and events, and were socially shunned by their peers, even family and friends, all of which disrupted their right to freely associate. Plaintiffs blamed these alleged consequences of the reprimands only upon the fact that they were disciplined, and not upon the fact that they were village policemen who wore ear studs in public and sometimes, it appears, may have conducted themselves in public in other ways unsuitable for police

officers. Their complaints about the public reaction, however, illustrate in their own words some of the adverse impact their conduct had on the morale, discipline, and effectiveness of the Peotone Police Department, the underlying issue in this case.

At the time the police department had a policy manual that governed police conduct and service. Plaintiffs were required to be, and were, familiar with it. In general, each officer was to lead an exemplary private life. Officers were subject to duty call twenty-four hours a day, and were required to respond when called whether on duty or off, day or night. In addition, intoxication was prohibited while on or off duty. Any conduct unbecoming an officer, disobedience to orders, insubordination and other mentioned deficiencies were likewise prohibited. The manual also set forth certain standards for uniforms for male and female officers. One standard prohibited ornamental items. Female officers were permitted to wear facial makeup, but only in moderation. Hair ribbons and barrettes were not allowed. Some things, for instance, the ban on intoxication and the prohibition of beards, would obviously apply to male officers on duty or off. Nothing was said specifically in the manual about male officers wearing earrings or ear studs, probably because it was not anticipated that male officers would do so.

The depositions of Chief Bogart, all members of both the Police Committee and the Village Board of Trustees, reveal the unanimous view that the ear studs worn by the plaintiff officers, on duty or off, had a detrimental effect on police department morale and diminished the respect of Peotone residents for their police force. The chief believed that the wearing of the ear studs by an officer, on or off duty, detracted from police professionalism and violated the manual requirement to remain neat and groomed. The chief further explained that the citizens of Peotone knew and recognized who their police officers were whether the officers were in uniform or not. The chief had never heard of a police department that permitted its officers to wear

any kind of earring, except for undercover work. Plaintiffs were not engaged in undercover police activity. A member of the Village Police Committee claimed that the officers had become the laughing stock of the community. Another committee member was of the opinion that the village citizens would not accept male officers wearing any type of earring, morale would suffer, and the department would function less effectively. Another member of the Village Board said that the comments of village citizens indicated astonishment at male officers wearing earrings, and that fact created public doubts about discipline within the village police force.

Others who testified by deposition offered similar views. A fellow police officer stated that he had been questioned. laughed at, and hurt by village citizens because his two plaintiff colleagues wore ear studs. Even in plaintiffs' families the ear stud caused some problems. Rathert's wife and sister explained that Peotone is a small town with a conservative viewpoint and that the majority disapproved of a male officer wearing an ear stud. Rathert's wife, obviously during a time of marital difficulties, also called Chief Bogart on a number of occasions to complain about her husband. She accused her husband of drinking and returning home and slapping her around. She also accused both plaintiffs of being "gay," an accusation that Chief Bogart said he did not believe. On another occasion Mrs. Rathert allegedly got Rathert's revolver and was going to shoot Zybak. Mrs. Rathert also expressed the view that Rathert deserved the punishment he received, and that the residents of Peotone and surrounding areas were "in an uproar." After plaintiffs had their ears pierced, some residents commented to her that Rathert's ear stud detracted from his authority as a police officer. Thus, the ear piercings themselves appears to have caused plaintiffs more immediate and personal problems than merely constitutional ones.

II. ANALYSIS

A. *The Substantive Due Process Claim*

The district court and the parties agree that the dispositive issue as to Count I is whether the reprimand letters issued by defendants to plaintiffs affected a constitutionally protected liberty interest, and whether the police policy expressed in those letters bears a rational relationship to a legitimate public interest. In other words, we must determine whether plaintiffs asserted a cognizable substantive due process claim under 42 U.S.C. § 1983.

The reprimand letters were based on three grounds: public intoxication, failing to complete police assignments, and wearing an ear stud on duty and off duty in violation of the Peotone Police Manual. The arguments here focus not on any claimed right to wear ear studs while on duty and in uniform, but when off duty and not in uniform. Their ear studs, plaintiffs claim, expressed their constitutional liberty interest in "individualized dress." Plaintiffs do not claim that they cannot be prohibited from wearing ear studs on duty even though ear studs or earrings are not specifically mentioned in the manual.

The district court observed that although the Supreme Court has not conclusively determined whether the fourteenth amendment creates a liberty interest in matters of personal appearance, this circuit has held that "choice of appearance is an element of liberty." *Pence v. Rosenquist*, 573 F.2d 395, 399 (7th Cir. 1978); *see also Crews v. Cloncs*, 432 F.2d 1259 (7th Cir. 1970); *Breen v. Kahl*, 419 F.2d 1034 (7th Cir.), *cert. denied*, 398 U.S. 937 (1969). Therefore, we begin as did the district court, by determining whether the reprimand letters bear a rational relationship to a legitimate public interest. The district court found such a relationship to exist and so do we.

The district court, as well as both parties, relied on *Kelley v. Johnson*, 425 U.S. 238 (1976). In *Kelley*, the president of the Patrolmen's Benevolent Association challenged the constitutionality of a county regulation limiting

the length of hair worn by male county police officers. The Court found no substantive due process fault with the regulation. In reaching that conclusion, the Court considered it "highly significant" that the protection of the fourteenth amendment was being sought, not by a member of the citizenry at large, but by and for police officers. The Court had previously recognized that although state employment cannot be conditioned on surrender of first amendment rights, the state, nevertheless, has interests in regulating the speech of its employees. Those interests differ significantly from those the state possesses in connection with the regulation of the speech of the citizens in general. *See Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *CSC v. Letter Carriers*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

The Court found that there was a significant distinction between the police and the public at large because of the police duty to keep the peace and the myriad other responsibilities of the police that have no counterpart in the public at large. In considering those other demands on police, the Court noted that police must wear standard uniforms specific in each detail, must salute the flag when in uniform, and may not take an active role in local political affairs. All of those common police requirements infringe on a police officer's freedom of choice in personal matters, and the political activity ban applies even when the police officers are off duty. Although the court of appeals had found that there was no justification to characterize the police as "para-military" and thus deserving of "unique judicial deference," the Supreme Court held that the county's choice of an organizational structure for its police force was nevertheless entitled to deference. A police structure had been chosen by the county that the county obviously believed would better enable the police to fulfill their responsibilities. That county organizational choice necessarily emphasized the overall need for discipline, *esprit de corps* and uniformity.

The Court in *Kelley* then viewed the challenged hair length regulation in the context of the county's police

structure. The Court observed that the states' police power to guard the safety of persons and property by employing a uniformed police force to aid in those responsibilities requires that the choice of organization, dress, and equipment be a state decision entitled to a presumption of legislative validity. The Court also noted that in other contexts there is wide latitude accorded the government in the "dispatch of its internal affairs." *Id.* at 247. The ultimate question, in the Court's view, was not "whether the State can 'establish' a 'genuine public need' for the specific regulation . . . [but] rather whether [the police officers] can demonstrate that there is no rational connection between the regulation . . . and [police responsibilities]." *Id.* The Court held that the hair length regulation clearly survived the plaintiff's constitutional challenge. The Court recognized that the overwhelming majority of state and local police are uniformed because similarity in appearance of police officers is desirable. This similarity may be desirable because it allows members of the public to readily recognize police officers or because it aids police *esprit de corps*. The Court held that either reason provided a sufficiently rational justification for the regulation to defeat the constitutional challenge.

The Supreme Court's holding in *Kelley* clearly supports the district court's decision in this ear stud case. The hair length regulation in *Kelley* applied to officers "while on duty" and the officers in the present case seek only to wear their ear studs while off duty. That difference, however, is only superficial. The hair length restriction in *Kelley*, by its very nature, applied whether the police officers were on or off duty. The Court upheld the regulation even though it governed the police officer's personal appearance when he was not performing his police duties and was not in uniform. So it is in the present case.

Few would quarrel with the Peotone police regulations that specifically prohibit, without reference to whether on duty or off, an officer being publicly intoxicated, or from using narcotics without a doctor's prescription. Peotone also prohibits beards and requires mustaches to be

neatly trimmed. Those restrictions also reach an officer's personal conduct when not on duty. The record demonstrates that the wearing of ear studs by Peotone police officers was seen by those who run the police structure, as well by as the public generally, to have an adverse impact on police effectiveness.

The Peotone police officers are members of a small community. They are generally known and recognized. There is little difference in the way the Village's police officers are publicly viewed, whether their objectionable conduct as police officers occurs on duty or off, or whether they wear the ear stud on duty or off. Plaintiffs admit being subject to ridicule, but ascribe it to their being disciplined, not to the wearing of ear studs. Such a claim, however, totally misplaces the blame for their discomfort. The record shows that even some family members and officer colleagues were disturbed by the ear studs as much as were the city officials. That earrings or ear studs were not specifically prohibited in the regulations is of no consequence, as the regulations are sufficient to reasonably ascribe the outlines of what is prohibited and what is expected of police officers whether on duty or off. No one could reasonably read the regulations as containing some implied exception at odds with the general tenor of the rest of the regulations that would permit certain off duty conduct that nevertheless would have an adverse impact on the police force.

It is obvious from the record that plaintiffs not only caused an adverse impact on police discipline, *esprit de corps* and uniformity, factors found by the Supreme Court in *Kelley* to be of controlling consequence, but caused great public dissatisfaction as well. Plaintiffs totally fail to meet the burden imposed by *Kelley* of showing no rational connection between the male ear stud prohibition and their police responsibilities.

Plaintiffs, relying on *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), argue that the opinion of the district court "sends the message that state employees have no

liberty rights as citizens to freedom of choice or individuality. For if the employees exercise those rights in a manner inconsistent with the norm of society that individuality will serve to justify prohibition or punishment." *Roberts* concerned the admission of women to membership into the Jaycees, a nonprofit national membership corporation. In the present case the plaintiffs misread the message that is directed only to the distinct circumstances of the police officers of Peotone.

Plaintiffs also claim that the district court's holding can only be based upon the erroneous concept that a police force is a para-military organization with the military's need for discipline and uniformity, a view that at least one district court in this circuit has rejected. *Kukla v. Village of Antioch*, 647 F. Supp. 799 (N.D. Ill. 1986). *Kukla* involved a police sergeant and a female police dispatcher unmarried but living together. The district court avoided *Kelley* by pointing out that the conduct complained about in *Kukla* fell within the "personal intimacies of the home," and that type of personal choice carried more weight in a constitutional balance than selection of hair length. However, in the instant case we are concerned with police appearance and behavior in public, not just with the personal intimacies of the home. Our holding is limited to the particular facts in this case. Plaintiffs have not argued they have a right to wear ear studs while vacationing outside the general Peotone area and not subject to call, and we do not decide that question.

Plaintiffs also argue that the only interest in prohibiting the wearing of ear studs while off duty is to promote Peotone's conservative viewpoint and narrow-mindedness and to suppress individuality, but that such an interest is not legitimate. That is an astounding argument. Plaintiffs were not hired as police officers to change "conservative or narrow-minded" Peotone, as Peotone is characterized by them. The important responsibilities of these police officers do not include attempting to change the Village's political and social outlook, whatever it may be, by wearing ear studs.

B. *The First Amendment Claim*

The complaint's Count II alleges first amendment violations in the briefest and most conclusory way by claiming only that the disciplining of plaintiffs violated their constitutional rights to free association. In the district court plaintiffs elaborated on the complaint by claiming that by wearing ear studs they "were expressing their desire to associate with others who condone the wearing of an ear stud as part of their leisure dress." Plaintiffs claimed that the defendants' disciplinary actions in some way "chilled" that desire.

Plaintiffs rely upon *Wilson v. Taylor*, 733 F.2d 1539 (11th Cir. 1984), to demonstrate that a violation of a police officer's freedom of association occurs when disciplined for off duty activities. A police officer in that case was fired for dating the adopted daughter of a convicted felon reputed to be a mob leader. That court held that "dating is a type of association that must be protected by the first amendment's freedom of association." *Id.* at 1544. In any event, however a comparable case on those facts might fare in this circuit, there is in the present case no dating or other intimate personal relationship.

We are no more impressed with plaintiffs' first amendment argument than was the district court. Plaintiffs are not prohibited from associating with others who wear ear studs, even other male police officers if they can find any. Plaintiffs have identified no police force anywhere where police officers wear ear studs on or off duty, nor identified any other particular group that does. As the district court noted, the Supreme Court has recognized a right to associate for the purpose of engaging in activities protected by the first amendment. *Roberts*, 468 U.S. 609 (1984). In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, courts consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship. *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537, 546 (1987).

Plaintiffs, however, have totally failed to identify any associational interest as police officers that warrants constitutional protection, nor could the district court find any suggestion by plaintiffs that they wear ear studs to express political, social, economic, educational, religious or cultural viewpoint, or any other expressive activity. Plaintiffs' justification for wearing the ear studs is merely that they "want to" and "for fashion." Those reasons would be enough for members of the public to wear ear studs, but not for police officers who work for the public.[5]

III. CONCLUSION

For the foregoing reasons, the district court's decision is, in all respects, affirmed.

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[5] The police officer in *Etscheid v. Police Bd. of Chicago*, 47 Ill. App. 2d 124 (1964), had a unique problem. In upholding his discharge the court, citing a book entitled *Police Administration* by O. W. Wilson, a former Superintendent of Chicago Police, makes the point that for the courts to become the final arbitrators in police disciplinary matters will cause a breakdown of police discipline and morale and frustrate police administration.

FAIRCHILD, *Senior Circuit Judge*, concurring. I do not take issue with the propriety of a police department regulation prescribing a uniform to be worn on duty and prohibiting the use of personal ornaments while on duty. If the judgment of the district court went no further than upholding the prohibition against wearing ear studs while on duty, I would readily join in affirming it. The problem which gives me pause is that the judgment now being affirmed upholds a prohibition against the wearing of ear studs by male police officers while off duty, at least in the particular town where this case arose.

I think we all agree that in order to sustain a regulation of off duty conduct, the regulation must be rationally related to a legitimate public interest such as the effectiveness of the officers. Here it appears that the rational relationship rests upon the alleged proposition that a significant segment of the town's population attribute to a male who wears an ear stud some personal characteristic such that they will ridicule rather than respect him. The theory appears to be that at least in a small community this response by citizens will impair the officer's effectiveness on duty even though it is only off duty that he is seen wearing the stud.

It would be hard to argue with the proposition that if particular conduct of a police officer while off duty tends to show a trait which will adversely affect his performance on the job, or to cause a loss of respect for him on as well as off the job, the prohibition or discipline of such conduct is rationally related to a legitimate public interest. Intoxication in public would be an example of a case where a judge can decide *a priori* that a rational relationship exists.[1] In *Swank v. Smart*, ____ F.2d ____, decided March 27, 1990, a married police officer had been disciplined, in part, for his off duty conduct in taking a young woman

[1] As explained by Judge Wood, intoxication while in public was another ground for discipline in this case. Because there was some dispute about the facts, the adequacy of this ground is not before us.

he met on the street for a late night motorcycle ride. This court decided, *a priori*, that disciplining him was not unreasonable. Slip op. at 8. I do not believe, however, that judges can say *a priori* that a male's wearing an ear stud tends to cause disrespect for him as a policeman.

The question we now reach is whether the court must find that the community attitude adverse to ear studs exists in fact before such attitude can be a link in a rational relationship between prohibiting off duty ear studs and the public interest. Or, is it enough to find that in taking action, the Chief and other decision makers reasonably perceived that this community attitude existed?

If a factual determination be required, the fact has not yet been determined. There has been no trial, and although many assertions concerning community attitude were before the court on summary judgment, they were not undisputed. One witness testified that she heard no reaction to Rathert's ear stud before this lawsuit began, and that after it was publicized, many persons commented that the Chief had no reason to demote Rathert.

I conclude, however, that the rational relationship test requires no more than that the decision makers reach their conclusion rationally, and that their reasonable perception of the community attitude is enough. I reach this conclusion reluctantly because of the likelihood that this is just an instance of bias against those who do not conform.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARVIN RATHERT and GARY ZYBAK	)	
Plaintiffs,	)	No. 87 C 0957
v.	)	
VILLAGE OF PEOTONE, WARREN BAKER, RONALD CRAMER, JOHN HALL, JAMES JANDA, THOMAS TUCKER, KENNETH EATINGER, RICHARD ANDERSON, and GARY N. BOGART,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, District Judge:

Plaintiffs filed this action under 42 U.S.C. Section 1983 alleging that defendants violated their rights under the First and Fourteenth Amendments to the United States Constitution. Both parties have filed motions for summary judgment, asserting that the essential facts in the case are undisputed. For the following

reasons, defendants' motion for summary judgment is granted and plaintiffs' motion for summary judgement is denied.

FACTS

Plaintiffs Marvin Rathert and Gary Zybak reside in the Village of Peotone, Illinois and are police officers for the Peotone Police Department ("PPD"). At the time the events in dispute in this case occurred, plaintiff Rathert was the only sergeant on the force and Officer Zybak was a patrolman. Defendant Gary N. Bogart served as Police Chief of the Peotone Police Department. Defendants Ronald Cramer, John Hall, and James Janda were members of the Police Committee of the Board of Trustees of the Village of Peotone. Defendants Thomas Tucker, Kenneth Eatinger, and Richard Anderson were members of the Village Board of

Trustees of the Village of Peotone.

The parties concede that until late 1986 the officers had performed their duties effectively. The Chief claims, however, that plaintiffs' performance deteriorated in 1986. He reports that, on a few occasions, the officers were disruptive and publicly intoxicated. In addition, he asserts that plaintiffs failed to complete certain of their assigned duties until Chief Bogart compelled them to do so.

Then, in December 1986, each plaintiff had his left ear pierced and began wearing an ear stud for "personal fashion reasons." Plaintiffs assert that (for the first six weeks) they had to wear their ear studs continually in order to prevent the hole in their ear lobes from closing. The officers therefore wore their ear

studs openly while they were off duty during the last two weeks of December, 1986. They also wore their ear studs while on duty during this period, but wore them covered with a bandaid.

On December 24, 1986 Chief Bogart drafted a reprimand letter. This letter asserted that (1) plaintiffs' ear studs violated the Peotone Police Policy Manual; (2) plaintiffs had been seen in public while intoxicated; and (3) plaintiffs failed to complete certain of their work assignments. (DX D and E). Officer Zybak's letter became a permanent part of his personnel file. Officer Rathert not only received a reprimand letter but also received a demotion to patrol officer and a corresponding decrease in his salary. Plaintiffs contend in this lawsuit that the reprimand letters violated their

Fourteenth Amendment liberty interest in "individualized dress" and their First Amendment right of association.

DISCUSSION

Summary judgment is appropriate only if the parties' evidentiary materials show that there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(c). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2510 (1986). If a party fails to make a showing sufficient to establish the existence of an element essential to its case, and on which it will bear the burden of proof at trial, there can be no genuine issue of fact, and summary judgment is mandated. Celotex Corp. v. Catrett, 106 S. Ct. 2548,

2533 (1986).

A. Substantive Due Process

In order to succeed on their due process claim, plaintiffs must show (1) that Chief Bogart's reprimand letters affected a constitutionally protected liberty interest, and (2) that the department policy (as expressed in the letters) bears no rational relationship to a legitimate public interest. Kelley v. Johnson, 425 U.S. 238, 96 S. Ct. 1440, 1444 (1976); Pence v. Rosenquist, 573 F.2d 395, 399 (7th Cir. 1978); Kukla v. Village of Antioch, 647 F. Supp. 799, 808 (N.D. Ill. 1986).

Plaintiffs assert that their ear studs expressed their constitutional liberty interest in "individualized dress." (P. Mem. at 13). Although the Supreme Court has not conclusively determined whether

the Fourteenth Amendment creates a liberty interest in matter of personal appearance, see Kelley, 96 S. Ct. at 1444, the law is clear in this circuit that "choice of appearance is an element of liberty." Pence, 573 F.2d at 399. Therefore, this court may assume for the purposes of this motion that Officers Rathert and Zybak have a liberty interest in their appearance, including an interest in wearing an ear stud. Cf. Olesen v. Board of Education, 676 F. Supp. 820, 822 (N.D. Ill. 1987)(male students have a liberty interest in wearing an earring to school).[1]

The dispositive issue in this case

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1. Because the court finds that plaintiffs have a liberty interest in their choice of dress and appearance, it need not decide whether plaintiffs have a liberty interest under the "stigma-plus test." See Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1971); Albamonte v. Bickley, 573 F. Supp. 77, 80 (N.D. Ill. 1983).

therefore becomes whether the reprimand letters that defendants issued to plaintiffs bear a rational relation to a legitimate public interest. Defendants assert that plaintiffs' ear stud violated certain provisions of the Peotone Police Policy Manual. (Exhibit B to the Complaint, DX B) ("Manual").[2] Police department regulations, based as they are on the department's method of organizing its force, are presumptively valid. Kelley, 96 S. Ct. at 1446; Kukla, 647 F. Supp. at 809. Defendants interpreted these regulations to prohibit male

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[2] Specifically, defendants assert that plaintiffs' ear studs violated the provision which prohibits any addition to the authorized police uniform without approval of the Police Chief (Manual at 22); the provision which prohibits "conduct unbecoming to a police officer" (Manual at 14); and the provision prohibiting "hair ribbons, barretts, and other ornamental items." (Manual at 23).

officers from wearing ear studs in public, even while they are off duty. Chief Bogart and the Police Committee reasoned that permitting male police officers to wear ear studs in public would not only detrimentally affect police department morale but also would diminish the respect local residents hold for the PPD.

Protecting the esprit de corps of the police force is a legitimate interest. Kelley, 96 S. Ct. at 1445; Kukla, 647 F. Supp. at 808. It is undisputed that the Village of Peotone is a relatively small town with a relatively small police department. (Rathert Dep. at 24.). Members of the police force not only work closely with one another, but also interact frequently with members of the community. (Rathert Dep. at 51; Zybak Dep. at 13). In such a close environment,

the overall need for discipline and uniformity among police officers becomes especially important. Kelley, 96 S. Ct. at 1445. The fact that Officer Rathert was one of only two supervisory officers at the time he received his reprimand letter increases the reasonableness of the Chief's belief that his ear stud would detrimentally affect the morale of the force. It therefore was reasonable for the defendants to believe that plaintiffs' ear studs would adversely affect the PPD.

The evidence submitted by the parties affirms defendants' belief that the plaintiffs' ear studs adversely affected the PPD. Chief Bogart apparently received reports and comments from the members of the Peotone community concerning plaintiffs' ear studs. (Bogart Dep. at 31-34, 55). The Chief presented these

comments to the Board of Trustees and the Police Committee. (Cramer Dep. at 9-10, 27; Janda Dep. at 10; Tucker Dep. at 5-7). One of plaintiffs' fellow officers, Jackie Cote, stated that he has been questioned, laughed at and hurt by residents of Peotone because of plaintiffs' ear studs. (Cote Dep. at 24-25). Officer Zybak likewise admitted that he has been the subject of derogatory comments by fellow officers and members of the Peotone community. (Zybak Aff. Paragraph 9; Zybak Dep. at 21, 51). Even officer Rathert's wife testified that residents of Peotone and the surrounding areas were "in an uproar" after plaintiffs had their ears pierced. (T. Rathert Dep. at 17-18, 36). Some individuals even commented to her that they believed Officer Rathert's ear stud detracted from his authority as a

police officer. (T. Rathert Dep. at 36).

After considering defendants' justification for disciplining Officers Rathert and Zybak and their evidence concerning the effect of plaintiffs' ear studs on the Peotone community, the court concludes that the department policy prohibiting male police officers from wearing ear studs in public bears a rational relationship to a legitimate department interest. Plaintiffs have failed to produce evidence to show otherwise. Consequently, summary judgment for defendants on Count I is appropriate.[3]

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[3] Much of the plaintiffs' evidence on this motion concerns the other two reasons defendants stated for disciplining plaintiffs -- public intoxication and dereliction of duty. Plaintiffs assert that these two reasons were merely a pretext and that defendants issued the reprimand letters solely because of plaintiffs' ear studs. However, evidence of pretext is not material to this motion for summary judgment. Even if defendants'

B. Right of Association

Count II of the complaint states that defendants violated plaintiffs' First Amendment right of association. Plaintiffs contend that by wearing an ear stud they "were expressing their desire to associate with others who condone the wearing of an ear stud as part of their leisure dress." (P. Mem. at 26). They claim that defendants' disciplinary actions in some way "chilled" this desire. (P. Mem. at 27).

The Supreme Court has recognized a right to associate for the purpose of engaging in those activities protected by

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sole reason for disciplining plaintiffs was the fact that they wore ear studs, defendants' reprimand was rationally related to a legitimate public interest. Defendants therefore did not violate plaintiffs' rights under the Fourteenth Amendment.

the First Amendment. Roberts v. United States Jaycees, 468 U.S. 607, 104 S. Ct. 3244, 3249 (1984). The First Amendment protects those relationships that involve "deep attachment and commitments" to the few other individuals with whom one shares "not only a special community of thoughts, experiences, and belief but also distinctively personal aspects of one's life." Id. at 3250. In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, courts consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship. Board of Directors of Rotary International v. Rotary Club, 107 S. Ct. 1940, 1946 (1987); Roberts, 104 S. Ct. at 3250.

Plaintiffs Rathert and Zybak have not articulated an associational interest which warrants constitutional protection. Plaintiffs do not suggest that they wear ear studs in order to express a particular political, social, economic, educational, religious or cultural viewpoint. Roberts, 104 S. Ct. at 3252. They do not correlate their interest in wearing an ear stud with any expressive activity whatsoever. Further, they do not claim to associate with any other individuals who wear ear studs. Plaintiffs are not members of an identifiable group of persons who believe that men are entitled to wear ear studs or that exclude other individuals who do not wear ear studs. Plaintiffs' ear studs simply do not implicate a constitutionally protected relationship. Defendants' reprimand did not impinge on plaintiffs'

rights under the First Amendment. Summary judgment for the defendants on Count II therefore is appropriate.[4]

CONCLUSION

For the reasons stated herein, defendants' motion for summary judgment is GRANTED and plaintiffs' motion for summary judgment is DENIED.

ENTER:

JAMES F. HOLDERMAN
United States District Judge

DATED: January 30, 1989

[4] Because defendants' motion for summary judgment is granted on the merits of the First and Fourteenth Amendment issue, the court need not determine whether the defendants were protected by qualified immunity.